

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1322

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1322

UNITED STATES OF AMERICA,

Appellee,

—v.—

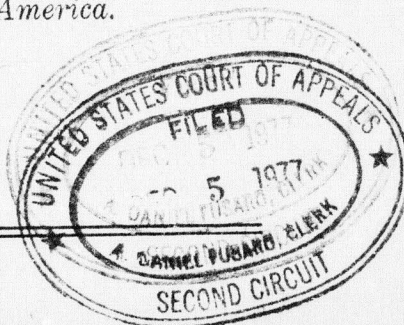
MICHAEL SILBERBERG and MORDECAI
SILBERBERG,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JEREMY G. EPSTEIN,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*



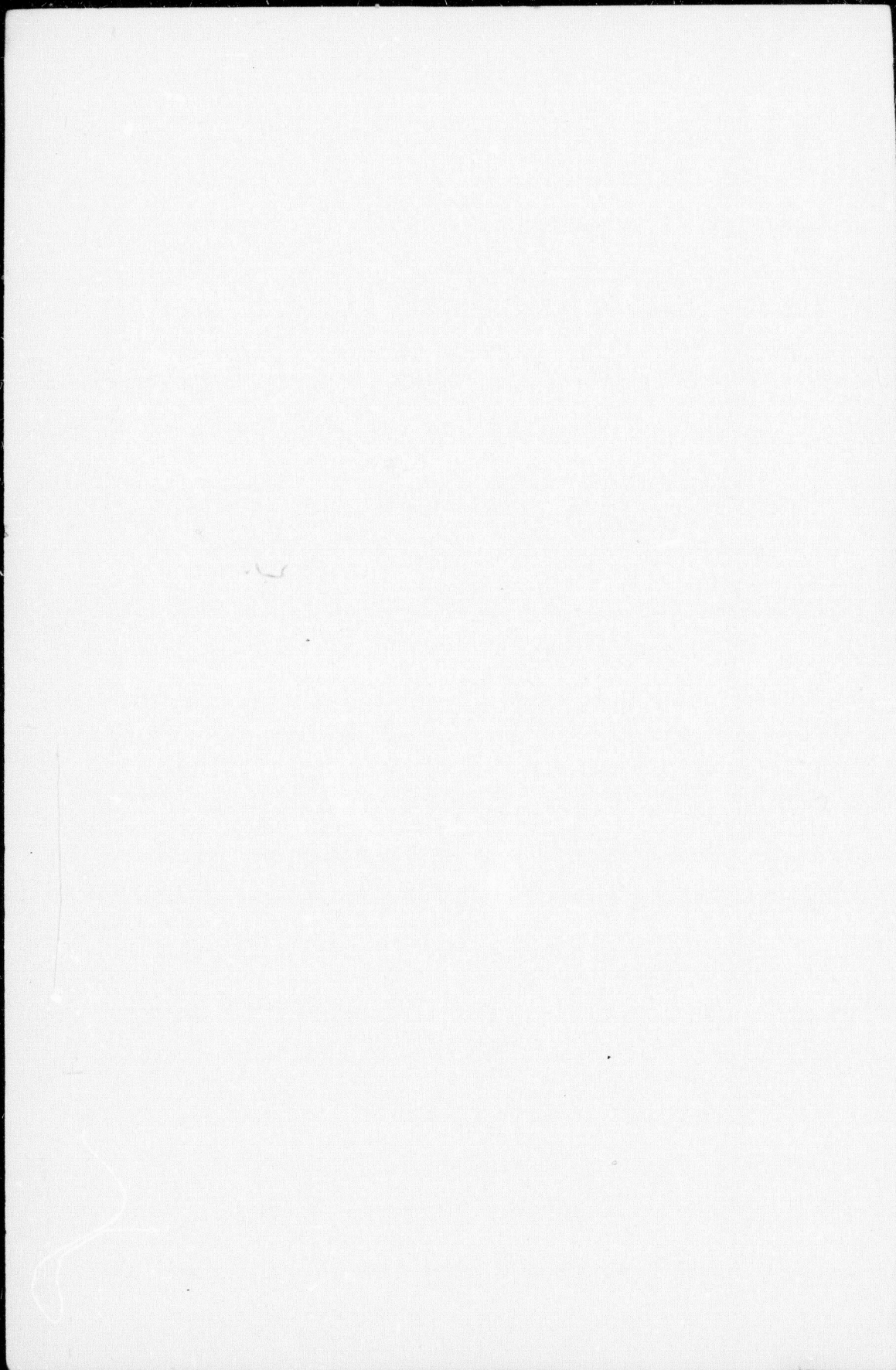


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
The Government's Case	3
A. Synopsis	3
B. Michael Silberberg's Work as an FBI Informant	3
C. The Counterfeit Check Scheme	4
D. The Sale of the Checks in Washington, D.C.	6
E. Michael's Meetings with the FBI in August, 1975	7
F. Defendants' Confessions to the FBI ..	8
G. The Defendants' Flight From New York	9
The Defense Cases	9
1. Michael Silberberg	9
2. Mordecai Silberberg	10
ARGUMENT:	
POINT I—The Trial Court Properly Denied Michael Silberberg's Motion To Suppress His Confession	10
A. The Suppression Hearing	11
B. The Law Applied to the Facts	13
POINT II—Mordecai Silberberg's Confession Was Not Coerced by FBI Agents and the Trial Judge Properly Refused to Suppress It.	20

	PAGE
A. The Suppression Hearing	20
B. The Claim of Coercion Is Not Supported by the Record	22
POINT III—The District Court's Charge on Interstate Transportation Was Correct and the Evidence Was Sufficient to Establish the Foreseeability of Interstate Transportation	25
POINT IV—Defendants' Other Claims Are Without Merit	29
CONCLUSION	31

TABLE OF CASES

<i>Brewer v. Williams</i> , 430 U.S. 387 (1977)	19
<i>Hancock v. Estelle</i> , 558 F.2d 786 (5th Cir. 1977) ..	18
<i>Hoffa v. United States</i> , 385 U.S. 293 (1966)	19
<i>Massiah v. United States</i> , 377 U.S. 201 (1964)	19
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	13, 17, 18, 23, 24
<i>Oregon v. Mathiason</i> , 429 U.S. 492 (1977)	18
<i>Tanner v. Vincent</i> , 541 F.2d 932 (2d Cir. 1976), cert. denied, 429 U.S. 1065 (1977)	19
<i>United States ex rel. Lewis v. Henderson</i> , 520 F.2d 896 (2d Cir.), cert. denied, 423 U.S. 998 (1975)	23, 24
<i>United States v. Blassingame</i> , 427 F.2d 329 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971)	26
<i>United States v. Boston</i> , 508 F.2d 1171 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975) ..	13, 23

	PAGE
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir.), cert. denied, 45 U.S.L.W. 3790 (June 7, 1977)	14, 17, 25
<i>United States v. Cassino</i> , 467 F.2d 610 (2d Cir. 1972), cert. denied, 410 U.S. 928 (1973)	23
<i>United States v. Cowden</i> , 545 F.2d 257 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977) . . .	26, 27
<i>United States v. Crimmins</i> , 123 F.2d 271 (2d Cir. 1941)	29
<i>United States v. D'Avanzo</i> , 443 F.2d 1224 (2d Cir.), cert. denied, 404 U.S. 850 (1971)	13
<i>United States v. DeKunchak</i> , 467 F.2d 432 (2d Cir. 1972)	25, 27
<i>United States v. Edwards</i> , 366 F.2d 853 (2d Cir. 1966), cert. denied, 386 U.S. 919 (1967)	19
<i>United States v. Estepa</i> , 471 F.2d 1132 (2d Cir. 1972)	30, 31
<i>United States v. Feola</i> , 420 U.S. 671 (1975)	27, 29
<i>United States v. Ferrara</i> , 377 F.2d 16 (2d Cir.), cert. denied, 389 U.S. 908 (1967)	17, 24
<i>United States v. Frazier</i> , 434 F.2d 994 (5th Cir. 1970)	16
<i>United States v. Friedman</i> , 558 F.2d 1125 (2d Cir. 1977)	13
<i>United States v. Glasgow</i> , 451 F.2d 557 (9th Cir. 1971)	16
<i>United States v. Gomez Londono</i> , 553 F.2d 805 (2d Cir. 1977)	18
<i>United States v. Green</i> , 523 F.2d 229 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976)	27, 29

	PAGE
<i>United States v. Harrington</i> , 490 F.2d 487 (2d Cir. 1973)	31
<i>United States v. Jacobs</i> , 475 F.2d 270 (2d Cir.), cert. denied, 414 U.S. 821 (1973)	27, 28, 29
<i>United States v. Jennings</i> , 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973)	26
<i>United States v. Kilbourne</i> , 559 F.2d 1263 (4th Cir. 1977)	18
<i>United States v. Ludwig</i> , 523 F.2d 705 (8th Cir. 1975), cert. denied, 423 U.S. 1076 (1976) ..	26, 27
<i>United States v. Martinez-Carcano</i> , 557 F.2d 966 (2d Cir. 1977)	14, 25
<i>United States v. Mingoia</i> , 424 F.2d 710 (2d Cir. 1970)	26
<i>United States v. Nemes</i> , 555 F.2d 51 (2d Cir. 1977)	30
<i>United States v. Oates</i> , 560 F.2d 45 (2d Cir. 1977)	13
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir. 1974), cert. denied, 421 U.S. 950 (1975)	30
<i>United States v. Pomares</i> , 499 F.2d 1220 (2d Cir.), cert. denied, 419 U.S. 1032 (1974)	17
<i>United States v. Powers</i> , 437 F.2d 1160 (9th Cir. 1971)	26
<i>United States v. Reynolds</i> , 532 F.2d 1150 (7th Cir. 1976)	16
<i>United States v. Rosner</i> , 352 F. Supp. 915 (S.D.N.Y. 1972), aff'd, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974)	19
<i>United States v. Scandifla</i> , 390 F.2d 244 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969)	25, 26, 27

	PAGE
<i>United States v. Shelby</i> , 431 F. Supp. 398 (E.D. Wis. 1977)	18
<i>United States v. Tannuzzo</i> , 174 F.2d 177 (2d Cir.), cert. denied, 338 U.S. 815 (1949)	25, 26, 27
<i>United States v. Toral</i> , 536 F.2d 893 (9th Cir. 1976)	19
<i>United States v. Vickers</i> , 387 F.2d 703 (4th Cir. 1967), cert. denied, 392 U.S. 912 (1968)	14
<i>United States v. Viruet</i> , 539 F.2d 295 (2d Cir. 1976)	27, 29
<i>United States v. White</i> , 451 F.2d 559 (6th Cir. 1971), cert. denied, 405 U.S. 1071 (1972) ...	26
<i>United States v. Williams</i> , 479 F.2d 1138 (4th Cir.), cert. denied, 414 U.S. 1025 (1973)	16



**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1322

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL SILBERBERG and MORDECAI SILBERBERG,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael Silberberg and Mordecai Silberberg appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on July 29, 1977, after separate jury trials before the Honorable Charles M. Metzner, United States District Judge.

Indictment 77 Cr. 264, filed April 12, 1977, charged Michael Silberberg * and Mordecai Silberberg in Count One with conspiracy to transport forged and counterfeited securities in interstate and foreign commerce, and in Count Two with interstate transportation of forged

* In the indictment, the last name of each defendant was spelled "Zilberberg." When defendants informed Judge Metzner of the correct spelling, the trial court granted the Government's motion to amend the title of the indictment.

and counterfeited securities, in violation, respectively, of Title 18, United States Code, Sections 371, 2314 and 2.

On June 2, 1977, Judge Metzner granted Mordecai Silberberg's motion to sever his trial from that of Michael Silberberg. Following a two-day hearing on defendants' motion to suppress their independent confessions, Judge Metzner denied these motions first orally, and later in a memorandum opinion, dated June 14, 1977. Trial commenced against Michael Silberberg on June 2, 1977, and concluded on June 3, when the jury found him guilty on both counts. Trial commenced against Mordecai Silberberg on June 3, 1977 and concluded on June 7, 1977, when the jury returned guilty verdicts against him on both counts.

On July 29, 1977, Judge Metzner sentenced each defendant to a term of fifteen months' imprisonment on Count One and on Count Two suspended imposition of sentence and placed each defendant on five years' probation. The District Court also directed that Michael Silberberg's term of imprisonment run consecutive to a one year term of imprisonment he was then serving based upon his conviction for mail fraud in the United States District Court for the Eastern District of New York. Michael Silberberg is now serving the Eastern District prison sentence. Mordecai Silberberg remains free on bail pending appeal.

Statement of Facts

The Government's Case *

A. Synopsis

The proof at both trials established that in the summer of 1975 Michael Silberberg, while working as an informant for the Federal Bureau of Investigation ("FBI"), was engaged, together with his brother Mordecai, in a scheme to sell and transport forged and counterfeited Bankers Trust Company official checks. Pursuant to this scheme, 90 of the bogus securities were sold by a co-conspirator to an undercover agent in Washington, D.C., and Michael attempted to sell more of the checks on a weekend excursion to Montreal, Canada.

B. Michael Silberberg's Work as an FBI Informant

In March, 1975, Michael Silberberg (hereinafter "Michael"), who recently had been convicted of mail fraud in the United States District Court for the Eastern District of New York, became an informant for the FBI. Michael met first with two FBI agents, Jim Moody and Paul Tompkins, who explained to him his obligations and responsibilities as an informant. At a meeting in a restaurant near Houston Street in Manhattan, Moody and Tompkins told Michael, *inter alia*, that he could be paid for the information he supplied them, that he was obligated to tell the FBI everything he knew, and that

* Since there were only slight differences between the proof offered by the Government at the two separate trials, we set forth a single Statement of Facts for both trials, with reference to the transcripts of both.

he was not permitted to engage in any criminal activity. (Michael Tr. 13-15).*

Between March and August, 1975, Michael provided the FBI with information about a wide variety of criminal activities, including hijacking, gambling, and extortion. He also provided information about members of the Colombo and Genovese organized crime "families".** During this period he was paid \$1,600 by the FBI, principally for information that led to the recovery of \$100,000 in hijacked merchandise. Michael never told the FBI anything that was self-incriminating. Eventually Michael was designated a "top echelon organized crime informant" by the FBI. (Michael Tr. 15-16, 30-32, 44-45, 112).

C. The Counterfeit Check Scheme

While acting as an informant, however, Michael also was engaged in criminal activity. In July, 1975, he and his brother Mordecai were looking for someone to invest with them in the purchase of stolen traveler's checks. Michael engaged the efforts of Steven Rowe, a friend, in finding investors. In late July, Rowe arranged a meeting between Michael, Leonard Eisenberg, an attorney, and Isiah Crutch, one of Eisenberg's clients, at a massage parlor called the Fifth Season, located at 315 W. 57th Street. At the meeting, neither Eisenberg nor Crutch expressed interest in purchasing the stolen

* "Michael Tr." refers to the transcript of Michael Silberberg's trial; "Mordecai Tr." refers to the transcript of Mordecai Silberberg's trial; "H. Tr." refers to the transcript of the pre-trial suppression hearing held on May 20 and 25, 1977; "GX" refers to Government Exhibits introduced at the two trials; "Br." refers to the appellants' brief.

** All references to organized crime were elicited by Michael's lawyer on cross-examination of Government witnesses. See, e.g., Michael Tr. 30-32.

traveler's checks. Crutch, however, mentioned that he was able to print counterfeit bank checks and asked if Michael was interested in such a venture. After several meetings at the massage parlor in July and August, Michael agreed to purchase a package of 100 counterfeit Bankers Trust Company official checks, having an aggregate face value of \$1,750,000.* In return Michael agreed to give Crutch a genuine cashier's check, stolen from the National Bank of North America. Michael also agreed to pay Crutch \$10,000 and to split with him the proceeds of his dealings in the Bankers Trust checks. (Michael Tr. 23-24, 184; Mordecai Tr. 35-37).

Michael received the checks from Crutch at the massage parlor in mid-August. He showed them to Mordecai and the two proceeded to look for customers for the checks. On or about August 25, 1975, they met with one Matthew Ianello at a bar on Bay Parkway in Brooklyn. Ianello stated that he could sell all of the checks for the Silberbergs, and they gave him as samples one check in each denomination. Mordecai, however, was apprehensive about dealing exclusively with Ianello. Michael therefore approached one Natale Lipari to act as a middle man. Lipari offered to pay the Silberbergs \$50,000 for the checks, compensate Ianello, and give the Silberbergs half his profits on the transaction. Satisfied with this arrangement, Michael delivered approximately 90 checks to Lipari on or about August 27, 1975, and was told he would be paid on August 29, 1975. When Michael looked for Lipari on that day, he could not find him. (Michael Tr. 24-25; Mordecai Tr. 26-40).

* The package contained 25 checks each in denominations of \$10,000, \$15,000, \$20,000, and \$25,000.

D. The Sale of the Checks in Washington, D.C.

Lipari and Ianello in turn passed the checks on to Steven Korsen. Korsen made known to a colleague in Washington, D.C., Eugene Brent, that the checks were for sale. On August 24, 1975, Brent was introduced in Washington by an FBI informant to Joseph Yablonsky, an FBI agent posing as a businessman interested in buying illicit commercial paper. Brent arranged a telephone conversation between Yablonsky in Washington and Korsen in New York, on August 25, 1975. During that conversation, Yablonsky agreed to meet Korsen later that day at LaGuardia Airport. (Michael Tr. 193-196; Mordecai Tr. 14-16).

Yablonsky flew to LaGuardia on August 25th and met at the airport with Korsen. Korsen showed him four counterfeit Bankers Trust Company official checks, one each in denominations of \$10,000, \$15,000, \$20,000 and \$25,000. He told Yablonsky that he was offering a package of 100 for sale, 25 in each denomination, and quoted a price of 50% of the face value of the checks. Yablonsky told Korsen that the asking price was excessive, but said that he would return to Washington and consider the offer further. (Michael Tr. 195-197; Mordecai Tr. 16-20).

Yablonsky and Korsen spoke several times by telephone between August 25 and August 29, and finally agreed on a price of 30% of the face value, or \$525,000. On August 29th, Korsen travelled from New York to Washington and met Yablonsky at the American Security and Trust Company. They proceeded to the vault area, where Yablonsky learned that Korsen had only 90 checks in his possession. The purchase price was adjusted accordingly, and Yablonsky then gave Korsen \$510,000 in cash, of which \$25,000 was intended to be a finder's fee for Brent.

Korsen was arrested by FBI agents as he left the vault area. (Michael Tr. 197-200; Mordecai Tr. 19-21).*

E. Michael's Meetings with the FBI in August, 1975

While arranging this scheme, Michael also maintained his status as an FBI informant. He met on two occasions in August with FBI agents to provide information: on August 5th, he met agent Ford Cole, and on August 21, he met agent Jim Moody. Michael told Cole that he had met a man named Ike (the name by which he knew Isiah Crutch) who was an extremely adept counterfeiter and told Cole how Ike could be reached through a paging service. Michael told both Cole and Moody that he had been to the Fifth Season massage parlor in the company of one Hymie Menschel, and that they had collected \$24,000 that was owing to Michael Generoso, a part owner of the club. Michael also told Moody on August 21st that the Fifth Season was frequented by criminals. Throughout these meetings, however, Michael never mentioned to either Cole or Moody that he had met Isiah Crutch at the Fifth Season, that he was negotiating for the purchase of counterfeit checks from Crutch, or that he was in possession of cashier's checks stolen from the National Bank of North America. He made no mention whatever of receiving or intending to receive counterfeit checks from Crutch. (Michael Tr. 18-20, 176-179).

* The 90 Bankers Trust Company checks purchased by Yablonsky from Korsen on August 29, 1975 were examined by the FBI Laboratory for latent fingerprints. One of the checks (GX 44) was found to bear the latent impression of the right ring finger of Mordecai Silberberg. (Mordecai Tr. 61-74).

F. Defendants' Confessions to the FBI

On or about September 1, 1975, agent Moody learned that Michael recently had been in Canada attempting to sell counterfeit checks. On September 2nd, he called Michael and asked to speak with him. Agents Moody, Cole, and their supervisor, James Nelson, met Michael later that day at a restaurant near 70th Street on the east side of Manhattan. Moody asked Michael what he had been doing over the past weekend and Michael stated that he had been in Spring Valley, New York with his family. Moody immediately advised Michael of his constitutional rights. Nelson then told Michael that the agents knew Michael was lying to them because Michael had been in Canada passing counterfeit checks. For approximately thirty minutes Michael denied any wrongdoing. He then admitted that he had been in Canada selling checks and told the agents the outline of the counterfeit check scheme he had arranged with Crutch. Michael also agreed to cooperate fully with the agents. (Michael Tr. 20-23, 66-70).*

During the next month Michael submitted to extensive interviews by F.B.I. agents regarding the Bankers Trust check scheme and other previously undisclosed crimes in which he had participated. He also agreed to wear a recording device and record conversations with various criminal associates. These recordings ceased on September 17, 1975, when one of Michael's associates discovered the recording device on his person. Michael thereafter was offered the services of the Witness Protection Program of the Department of Justice. (Michael Tr. 23-26, 160-162).

* The circumstances of Michael's confession are the basis for his principal claim on this appeal. We set forth more fully in Point I of the Argument section of this brief the details of Michael's confession as established at the suppression hearing.

Mordecai also was interviewed in September by FBI agents about various criminal activities. On September 19, 1975, he was formally advised of his rights and signed a waiver of rights form. On September 22, he was interviewed about the Bankers Trust check scheme and admitted his role in helping his brother distribute the checks. (Mordecai Tr. 30-41).*

G. The Defendants' Flight From New York

In early October, 1975, Michael, who was scheduled to surrender to begin service of his prison sentence in the Eastern District of New York, and Mordecai fled from New York. They remained fugitives until they were finally arrested by the FBI on March 30, 1977. (Michael Tr. 26-27; Mordecai Tr. 41-42).

The Defense Cases

1. Michael Silberberg

Michael Silberberg did not testify, but called as a witness his wife, Esther Silberberg. She testified that her husband worked as an informant for the FBI in the hope of obtaining a reduction of the one year prison sentence imposed in the Eastern District of New York. She further testified that she and Michael had been at a Holiday Inn in Spring Valley, New York, from August 29 through September 1, 1975. Defendant's wife admitted, however, that her husband was in Montreal on August 27 and 28 and that she knew nothing of his activities there. She said that she had discussed the matter of Michael's

* The circumstances of Mordecai's confession also are the basis for his principal claim on appeal, a matter we address in Point II of the Argument section of this brief.

entering the Witness Protection Program with him in September, 1975, but was concerned about the disruption to their family caused by entry into the program. She stated that Michael fled from New York in October, 1975 because he was concerned over the aggravation he was causing his family. (Michael Tr. 205-222).

2. Mordecai Silberberg

Mordecai Silberberg offered no evidence.

A R G U M E N T

POINT I

The Trial Court Properly Denied Michael Silberberg's Motion To Suppress His Confession.

Michael Silberberg argues that Judge Metzner erred in denying his motion to suppress the incriminating statements he made to agents of the FBI on September 2, 1975 and in the ensuing weeks. On appeal, he claims that his statements were induced by promises from the agents that he would not be prosecuted if he cooperated with them. The record of the suppression hearing, however, demonstrated that Michael was specifically advised that his statements could be used against him and was never promised immunity. Moreover, Michael's appellate contention was not advanced in its present form in the District Court. Judge Metzner correctly determined that Michael gave his confession voluntarily, after being advised fully of his constitutional rights, and he therefore properly denied his suppression motion.

A. The Suppression Hearing

Prior to trial Michael moved to suppress all statements made by him on September 2, 1975 and thereafter. The basis for the motion, as Michael asserted in an affidavit accompanying the motion, was "that at all times I was informed that any statements made by me *would not* be used against me in any possible or potential criminal prosecution, either state or federal." Judge Metzner held a hearing on this motion (as well as on a similar motion made by Mordecai) on May 20 and 25, 1977. Five FBI agents and one Assistant United States Attorney for the Eastern District of New York testified for the Government. Michael neither testified nor called any witnesses on his behalf. The evidence at the hearing established that at the focal meeting of September 2, 1975, Michael for the first time admitted that he had been committing crimes while an FBI informant. It is at this meeting that Michael now claims promises were made that these admissions would not be used against him. The three FBI agents present at this meeting, Jim Moody, James Nelson, and Ford Cole, all testified at the hearing; Michael did not.

The proof at the hearing established that after Moody learned, on or about September 1, 1975, that Michael had been in Canada offering counterfeit checks for sale, he called him and arranged the September 2nd meeting. At the meeting, Michael was asked by Moody what he had been doing the previous weekend and he answered that he had been in Spring Valley, New York with his wife. Moody then immediately advised him of his constitutional rights—including the fact that anything he said could be used against him—and Nelson accused him of lying to them. Michael was advised that he was liable to be prosecuted for what he had done and was told that he would probably go to jail. He was also asked if he wished to cooperate. At no time did anyone tell Michael that he

would not be prosecuted on the basis of statements made to the FBI.

Although Michael initially denied for one half hour his involvement in any criminal acts, he eventually agreed to cooperate and admitted his role in passing the counterfeit Bankers Trust checks. In the weeks that followed, he gave the FBI a more extensive account of his participation in this scheme. (H.Tr. 16-23, 36, 82-83, 103-104, 176-178).

At the hearing, all three agents explicitly contradicted the assertion made by Michael in the affidavit in support of his motion. All testified that Michael was advised of his constitutional rights and was told that anything he said could be used against him. (H.Tr. 19, 104, 177). All testified that Michael was *not* told that he would not be prosecuted on the basis of statements made to the FBI. (H.Tr. 20, 104, 177). Moody testified that he told Michael that he could expect to go to jail as a result of this scheme (H.Tr. 83), and Cole testified that Michael was advised that he would be prosecuted. (H.Tr. 177). Further, Thomas Pattison, an Assistant United States Attorney in the Eastern District of New York who met Michael in September 1975 to discuss the Witness Protection Program, also testified that he had never promised Michael that he would not be prosecuted on the basis of information supplied to the Government.*

* Pattison's testimony was buttressed by the minutes of a hearing held before Judge Edward R. Neaher of the Eastern District on September 29, 1975, at which Michael moved, unsuccessfully, for reduction of his mail fraud sentence pursuant to Fed R. Crim. P. 35. Pattison refused to consent to the motion, and added:

"I believe that concerning other areas we are trying to ascertain now whether or not he will be charged. I believe he will not be charged with other criminal actions known to our office now." (pp. 10-11)

[Footnote continued on following page]

At the conclusion of the hearing Judge Metzner orally denied Michael's motion (H.Tr. 288) and later filed a brief memorandum in support of the decision (A.10-11). Specifically, the District Court found that Michael had been adequately advised of all of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), a finding which necessarily included a determination that he had been advised that any statements made could be used against him.

B. The Law Applied to the Facts

The law in this Circuit is clear that a trial judge's decision on a motion to suppress will not be set aside unless clearly erroneous. *United States v. Friedman*, 558 F.2d 1125 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Boston*, 508 F.2d 1171, 1175 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975); *United States v. D'Avanzo*, 443 F.2d 1224 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). Moreover, on appeal the evidence at the suppression hearing must be viewed in the light most favorable to the Government. *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977). In the present case, Judge Metzner's decision was compelled not only by the overwhelming evidence the Government adduced which demonstrated that defendant was advised that any statements made could be used against him, but also by Michael's conspicuous failure to testify in support of his own motion, or indeed to offer any proof to refute the testimony of the Government's witnesses. Thus, the

Pattison later added, and Michael's lawyer agreed, that no promises of any kind had been made to Michael either by the United States Attorney's Office for the Eastern District of New York or by the FBI (p.14). The transcript of this proceeding was offered in evidence at the suppression hearing (H.Tr. 196) and considered by Judge Metzner. Michael misleadingly quotes only a portion of Pattison's remarks in his brief (Br.13), in an effort to use these remarks to support the alleged promises of immunity extended by the agents. At the suppression hearing, Judge Metzner rejected this contention by referring to Pattison's full statement, read in its proper context, (H. Tr. 217).

record contains no evidence that suggests that the District Court's findings were anything but correct.*

Confronted with the uncontradicted evidence at the suppression hearing that he was fully advised of his constitutional rights, Michael has devised a new claim which he raises for the first time in this Court: he contends that the agents coerced his confession by promising not to prosecute him if he cooperated. First, this claim was not advanced by Michael in the District Court, where he contended that he had been specifically advised that anything he said could not be used against him. The claim therefore cannot be raised on appeal. *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 7, 1977); *United States v. Martinez-Carcano*, 557 F.2d 966 (2d Cir. 1977). Second, even viewed on its merits, Michael's claim is legally and factually unsupportable.

Michael's argument is based on a single excerpt from agent Mody's testimony, (H.Tr. 20), in which Moody stated that Michael was given a choice of cooperating or being immediately prosecuted. The excerpt quoted in Michael's brief (Br.12) conveniently omits the next question and answer:

"Q. Mr. Moody, did you ever tell Mr. Silberberg on this occasion [September 2] that he would not be prosecuted on the basis of the statements he made?

A. No." (H.Tr. 20)

* Judge Metzner did not make an explicit finding that Michael had not been promised that his statement would not be used against him. His denial of Michael's motion, however, amounts to an adoption of the testimony of the Government's witnesses on this point. *United States v. Vickers*, 387 F.2d 703, 706 (4th Cir. 1967), *cert. denied*, 392 U.S. 912 (1968).

Michael's brief also fails to make mention of Moody's statement, on cross-examination, that he told Michael that he would probably be going to jail because of this scheme. (H. Tr. 83). Defendant's argument further ignores the testimony of the other agents that Michael never was told he would not be prosecuted. (H. Tr. 104, 177). Cole, indeed, testified that Michael was told that "we were going to go ahead with prosecution of him immediately." (Tr. 177).

It is thus apparent that Michael merely was asked for his cooperation, and told that if he did not cooperate, the matter would be immediately presented to the United States Attorney. He was never told that if he did cooperate, his statements would *not* be used against him, or that his cooperation would result in a decision by the Government not to prosecute him.

There is no support in the hearing record for Michael's argument that the request for his cooperation amounted to a promise to forego prosecution. Most damaging to his claim is the fact that he did not even take the witness stand to testify as to his understanding of the agents' remarks. Further, Michael's actions on September 2 and thereafter are not those of one who has received a blanket promise of immunity. If, as he claims, he was offered immunity in exchange for cooperation, there was simply no reason for him to deny the agents' accusations of wrongdoing and to maintain steadfastly his innocence for a full half hour.* Moreover, if Michael believed that he had

* In his opinion, Judge Metzner recognized that Michael's initial denials of guilt at this meeting completely undermined his argument that by committing crimes he had simply been doing what was expected of him as an informant:

"Even if it did, it is incomprehensible that Michael Silberberg, when confronted by the agents on September

[Footnote continued on following page]

been promised immunity on September 2, his silence in the face of the agents' later assurances that he would be going to jail for his involvement in the check scheme is inexplicable. Even more inexplicable is his silence during Assistant United States Attorney Pattison's remarks to Judge Neaher on September 29, 1975 that no promises had been made to Michael and that the Eastern District had not yet decided whether to prosecute him further. In short, the evidence adduced at the hearing demonstrates compellingly that the agents did no more than solicit Michael's cooperation and promised him nothing in return.*

It is entirely permissible for agents to urge a defendant to cooperate, and even to suggest that he may be treated more leniently if he does. *United States v. Reynolds*, 532 F.2d 1150, 1156-1160 (7th Cir. 1976); *United States v. Williams*, 479 F.2d 1138 (4th Cir.), *cert. denied*, 414 U.S. 1025 (1973); *United States v. Glasgow*, 451 F.2d 557, 558 (9th Cir. 1971); *United States v. Frazier*, 434 F.2d 994 (5th Cir. 1970). This Court has held that it is proper for

2, 1975, did not readily admit the transactions concerning the counterfeit bank checks. Instead, for about one-half hour he steadfastly maintained his innocence and lack of any knowledge concerning these transactions." (A. 10).

* Even if the argument in Michael's brief is fully accepted, the most generous interpretation that can be placed on Moody's statement was that Michael was promised that he would not be prosecuted *if* he cooperated. As the record amply proves, Michael did not fully cooperate. He did wear a recording device for a time and submit to interviews, but he fled from New York long before his work for the FBI was completed. He has never testified before a grand jury or at a trial, and none of those against whom he offered to cooperate has been prosecuted with his assistance. Thus, even if there was an implicit bargain between Michael and the agents, the bargain was abrogated by his flight from New York.

agents to apprise a defendant of the benefits of cooperation and to evaluate the options before him:

"Having fairly and fully advised Pomares of his constitutional rights, as required by *Miranda*, the agents were free to discuss with Pomares the reasons why he should cooperate. It was quite proper in the course of such discussion to mention the situation which Pomares faced and the advantages to him if he assisted the Government. The agents stated facts they made no misrepresentations. Nothing the agents were shown to have said or done was unfair or over-reaching." *United States v. Pomares*, 499 F.2d 1220, 1222 (2d Cir.), *cert. denied*, 419 U.S. 1032 (1974).

See also *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967). Since the record plainly shows that nothing more was done here, Michael's claim on appeal must be rejected.

Michael also argues that his rights were violated by the agents' failure to advise him of his constitutional rights at the very outset of the September 2nd interview. He argues that this failure should have led to the suppression of the statement he made before the warnings were given, i.e., that he had spent the previous weekend in Spring Valley with his family. Michael further suggests that the statement thus elicited without *Miranda* warnings "compelled" him to answer further questions once the warnings were given, as they were by Moody immediately thereafter. Several responses can be made to these arguments. First, they were never presented to Judge Metzner and therefore were waived by defendant's inconsistent position in the District Court, *United States v. Braunig*, *supra*. Michael never claimed below that he should have been given *Miranda* warnings earlier; he claimed that they were not given at all.

Second, the agents were not required to give Michael *Miranda* warnings. In *Oregon v. Mathiason*, 429 U.S. 492 (1977), the Supreme Court held that warnings need be given only during a custodial interrogation:

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 429 U.S. at 494.

The Court held that a defendant who appeared voluntarily at a police station and thereafter submitted to an interview was not the subject of a custodial interrogation. See also, *United States v. Gomez Londono*, 553 F.2d 805, 811 (2d Cir. 1977); *United States v. Kilbourne*, 559 F.2d 1263, 1264 (4th Cir. 1977); *Hancock v. Estelle*, 558 F.2d 786, 788 (5th Cir. 1977); *United States v. Shelby*, 431 F. Supp. 398, 402 (E.D. Wis. 1977).

Michael certainly was not "in custody" within the meaning of *Mathiason* during the September 2nd interview, which was conducted at a restaurant, not at the FBI office, and which Michael attended voluntarily. He was never placed under arrest and was permitted to leave freely at the conclusion of the interview. Out of an excess of caution, the agents advised him of his rights as soon as he appeared to be lying to them. Under *Mathiason*, however, the agents' decision to do so was not required, and, in any event, it is clear that no warnings were required at the outset of the proceedings.

Michael finally claims that the statements he made after the warnings were given were tainted because they somehow were compelled by the remarks he made before he received the *Miranda* warnings. Defendant does not elaborate this argument (Br. 14) and it is plainly frivolous. This Court has considered and rejected the

argument that statements made prior to the receipt of *Miranda* warnings automatically render involuntary any statements made after full warnings are given. *Tanner v. Vincent*, 541 F.2d 923, 936-37 (2d Cir. 1976), *cert. denied*, 429 U.S. 1065 (1977); *see also United States v. Toral*, 536 F.2d 893, 896 (9th Cir. 1976). Rather, the Court has held that the voluntariness of the post-warning statement must be determined after an examination of the totality of the circumstances in which it was given. Judge Metzner plainly resolved that issue in favor of the Government, and Michael's argument therefore must be rejected.*

* In a footnote (Br. 15), Michael suggests that the statements were obtained from him in violation of his Sixth Amendment right to counsel because he was then under indictment in the Eastern District of New York and thus represented by counsel. He argues that his statements should be suppressed on the authority of *Brewer v. Williams*, 430 U.S. 387 (1977) and *Massiah v. United States*, 377 U.S. 201 (1964). This argument is misconceived. *Brewer* and *Massiah* held merely that if agents took statements from a defendant who was the subject of a pending judicial proceeding, those statements could not be introduced during that proceeding. Neither *Massiah* nor *Brewer* preclude the use of those statements in a subsequent prosecution. This limitation of *Massiah* was made clear in *Hoffa v. United States*, 385 U.S. 294 (1966). In *Hoffa*, a Government informant was present during conferences between a defendant on trial and his lawyer and related some of these conversations to the Government. None of this information was introduced into evidence at that trial, which ended in a hung jury, but it was used in a subsequent prosecution against the same defendant for jury tampering. The Supreme Court found no impropriety in the use of the defendants' statements in the subsequent proceeding. This limitation of *Massiah* has been recognized in this Circuit. *See United States v. Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), *cert. denied*, 386 U.S. 919 (1967); *United States v. Rosner*, 352 F.Supp. 915, 924-925 (S.D.N.Y. 1972) *aff'd*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). There was therefore nothing wrong with using Michael's statements in any prosecution subsequent to the Eastern District mail fraud case.

POINT II

Mordecai Silberberg's Confession Was Not Coerced by FBI Agents and the Trial Judge Properly Refused to Suppress it.

Mordecai Silberberg also moved prior to trial to suppress the statements he made to the FBI, and Judge Metzner in the same opinion also denied that motion after a hearing. Mordecai claims that this denial was error, and that his statements were coerced by threats on his life which had been "orchestrated" (Br. 17) by FBI agents. This claim not only is factually and legally meritless, but it is flatly refuted by Mordecai's own testimony at the suppression hearing.

A. The Suppression Hearing.

Testimony adduced by the Government at the hearing showed that in September, 1975, the FBI received information that certain of the creditors of the Silberberg brothers intended to kidnap Mordecai, hold him for \$10,000 ransom to Michael, and then kill them both when Michael came forward with the ransom money. Agent Moody therefore asked Michael to contact Mordecai. Michael did so, and Mordecai met agents Moody and Ford Cole in an apartment near 76th Street and First Avenue in Manhattan on September 16, 1975. The agents told Mordecai that they believed that his life was in danger and that he was about to be kidnapped and murdered. They also requested Mordecai's cooperation in the investigations they were conducting. Mordecai stated that he did not believe his life was in danger and had no interest in cooperating with the FBI. (H. Tr. 22-25, 178-179).

On September 17th, Michael was discovered wearing a recording device by two criminal associates, Anthony Fer-

rante and Joseph Schnitzer, but was released unharmed. Michael then placed a call to Mordecai and summoned him to the FBI office in Manhattan. When Mordecai arrived he was again told that his life was in danger but still expressed disbelief at these warnings. The brothers, however, did accept the agents' offer to spend a night in a hotel near the FBI office. On the following day, September 18th, Mordecai went to visit a friend in Brooklyn in the company of several agents. The friend, Martin Lefkowitz, told him that several individuals with guns had been looking for him. Later that day, the brothers agreed to remain in a hotel that night. (H.Tr. 25-28, 130-134).

On the morning of September 19th, a Friday, several agents met the Silberberg brothers in their hotel room. Mordecai at that time agreed to provide information to the agents, after he was orally advised of his constitutional rights. He was also given a standard FBI waiver of rights form which, after some initial reluctance, he signed. Thereafter, Mordecai submitted to an interview of several hours, the principal subject of which was hijacking. Later that day agents took both brothers to the United States Attorney's Office for the Eastern District of New York, where the Witness Protection Program was explained to them. They were then taken to the home of relatives in Brooklyn, where they spent the weekend. (H. Tr. 29-32, 135-141).

On the following Monday, September 22, Mordecai returned to the FBI office for further interviews. On that day he told the agents, *inter alia*, of his participation in the passing of the counterfeit Bankers Trust checks. Over the next two weeks he continued to reside with relatives in Brooklyn, and was interviewed by the FBI on one further occasion, September 29, 1975. (H. Tr. 141-145).

B. The Claim of Coercion Is Not Supported by the Record.

Mordecai argues on appeal that his statements should have been suppressed because his "confession was induced by threats" (Br.16); that "the agents carefully orchestrated the threat to Mordecai's life to overcome his silence and compel his cooperation" (Br.17); and that he resisted cooperation until "his physical safety was at stake" (Br.19).

The simplest and clearest refutation of these arguments can be found in Mordecai's own testimony at the suppression hearing. Mordecai testified that he was *never* afraid for his life; he was neither afraid after Michael had been caught wearing a tape recorder on September 17*, nor was he afraid after he was informed by Lefkowitz on September 18 that several of Michael's criminal associates were looking for him.** Mordecai further testified that he agreed to cooperate on the afternoon of Wednesday, September 17th (H. Tr. 254), a time when he apparently felt no fear whatever. Finally, Mordecai explicitly stated that he decided to cooperate because Michael had been caught wearing a recording device and he wished to assist him, *not* because he felt himself to be in any danger.***

* "Q. You didn't believe that your life was in any danger, is that correct, on September 17th?

A. Correct.

Q. Did you believe what Mr. Moody was stating to you about the kidnap plan?

A. No, sir." (H.Tr. 239)

** "Q. Mr. Silberberg, after your conversation with Mindy [Lefkowitz] on September 18th, did you believe your life to be in danger?

A. No, sir.

Q. Two men who had discovered your brother on the previous day were looking for you and you did not believe your life to be in danger; is that your testimony?

A. No, sir." (H.Tr. 246)

*** "Q. It was the fact that your brother was caught with the bug that prompted you to cooperate; correct?

A. Yes, Sir." (H.Tr. 249)

We submit that the foregoing completely disposes of the extravagant claims made in defendants' brief that Mordecai's statements were the product of coercion and threats upon his life. Indeed, when considered in light of his testimony at the suppression hearing, Mordecai's repeated contentions on this appeal simply are astounding. Although it may seem supererogatory, there are other facts that further underscore the voluntariness of his statements to the FBI.

First, as Judge Metzner found, on September 19, Mordecai was advised of his rights pursuant to *Miranda v. Arizona* 384 U.S. 436 (1966) and signed a written form acknowledging these rights and waiving them.* Cf. *United States ex rel. Lewis v. Henderson*, 520 F.2d 896, 901 (2d Cir.), cert. denied, 423 U.S. 998 (1975).

Second, Mordecai was never in custody during his interviews with the agents. He was not even guarded while he and Michael stayed at a hotel on the evenings of Sep-

* Mordecai claims (Br.19) that he was misled into signing the waiver form by Moody's statement to him that Michael had already signed such a form. Moody testified at the hearing that he had so advised Mordecai, and that he had been in error. (H. Tr. 30). However, Moody stated that he did not intend to mislead Mordecai, but had instead believed at the time that Michael had signed a form. (*Id.*) Michael was in the same room with Mordecai when Moody spoke to him, and Mordecai easily could have verified Moody's statement if it had been of any importance to him. Nevertheless, even if one accepts Mordecai's argument that he was misled into signing the waiver, he is entitled to no relief. There is no question here that Mordecai was orally advised of his rights and that he subsequently agreed to answer the agents' questions. This Court has held that a written waiver is not required where a defendant has been advised of his rights orally. *United States v. Boston*, 508 F.2d 1171, 1175 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975); *United States v. Cassino*, 467 F.2d 610, 620 (2d Cir. 1972), cert. denied, 410 U.S. 928 (1973).

tember 17 and 18, 1975; he was merely accompanied by agents, for his own protection, when he went outside. Mordecai was never cut off from his family or denied the opportunity to consult with others. *Cf. United States ex rel. Lewis v. Henderson, supra*, 520 F.2d at 901. Indeed, the statements that Mordecai sought to suppress concerning the Bankers Trust checks were not made until Monday, September 22, three days *after* he signed the waiver form and the agents commenced interviews. Mordecai had spent the intervening weekend with his family, not in the company of FBI agents, and he came voluntarily to the FBI offices on September 22 to resume the interviews. Even assuming that Mordecai was subjected to threats or coercion on September 19th in the hotel, it is unlikely in the extreme that he was still suffering from the same pressures by the following Monday. Indeed, the best evidence that Mordecai's will was not overborne was that, when he wanted to, he simply fled from New York.

Finally, even if one assumes—contrary to his hearing testimony—that Mordecai was induced to cooperate out of fear for his life, he still would not be entitled to relief. Whatever coercion Mordecai felt was the product of external circumstances, not of the action of the Government agents. *Miranda* does not require that all statements made in coercive circumstances be suppressed; it requires suppression only when the “conduct of law enforcement officials was such as to overbear the defendants’ will.” *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967) (*Italics supplied*). Nothing in the conduct of the agents was coercive.* If Mordecai found himself coerced, it

* Mordecai's claim (Br.17) that the agents “carefully orchestrated” the threats on his life verges on the ludicrous. Nothing in the record suggests that the agents were acting other than in good faith when they warned Mordecai of the plot to kidnap and murder him.

was only because his own activities and those of his brother had brought him into contact with some rather unsavory people who then were looking to kill him.

Accordingly, there was no basis to have suppressed Mordecai's statements to the FBI, and the District Court's denial of defendant's motion was completely correct.

POINT III

The District Court's Charge on Interstate Transportation Was Correct and the Evidence Was Sufficient to Establish the Foreseeability of Interstate Transportation.

Both defendants claim that the District Court's charge on the elements of Section 2314 was erroneous in that Judge Metzner failed to instruct the jury that the defendants must be shown to have foreseen the interstate transportation of the counterfeit Bankers Trust checks. This argument, based on a misplaced reliance upon *United States v. Scandifia*, 390 F.2d 244 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969) is available on appeal only to Michael, whose counsel objected to the charge. (Michael Tr. 222-224). Mordecai made no objection to the charge, and his present contention was thus waived by the very terms of the *Scandifia* opinion. 390 F.2d at 248. See also *United States v. DeKunchak*, 467 F.2d 432, 436 (2d Cir. 1972); *United States v. Braunig*, *supra*; *United States v. Martinez-Carcano*, *supra*.

The objection to Judge Metzner's charge is, in any event, meritless. The settled law in this and other Circuits, commencing with Judge Augustus Hand's decision in *United States v. Tannuzzo*, 174 F.2d 177 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949), is that a conviction under Section 2314 requires the Government to show only

"that the defendant knew that the goods were stolen and that they were in fact transported in interstate or foreign commerce." 174 F.2d at 180.

See also, *United States v. Jennings*, 471 F.2d 1310, 1312 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States v. Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *United States v. Mingoia*, 424 F.2d 710, 713 (2d Cir. 1970); *United States v. Cowden*, 545 F.2d 257, 263 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977); *United States v. Ludwig*, 523 F.2d 705, 707 (8th Cir. 1975), *cert. denied*, 423 U.S. 1076 (1976); *United States v. White*, 451 F. 559-560 (6th Cir. 1971), *cert. denied*, 405 U.S. 1071 (1972); *United States v. Powers*, 437 F.2d 1160, 1161 (9th Cir. 1971).

Defendants' suggestion that the decision in *United States v. Scandifia*, *supra*, establishes a different rule, misreads the *Scandifia* opinion. *Scandifia*, which neither cites nor discusses *Tannuzzo*, only attempts to define the circumstances under which a defendant "causes" the interstate transportation of securities. 390 F.2d at 249. It reaches no ultimate definition, but simply concludes that the causation requirement is satisfied when the interstate transportation is reasonably foreseeable. *Scandifia*, thus, neither considers the *minimum* necessary for conviction under Section 2314, as *Tannuzzo* does, nor purports to establish as an essential element actual or imputed knowledge of the interstate transportation of the securities.* See *United States v. Ludwig*, *supra*, 523

* That *Scandifia*, however viewed, does not make knowledge of interstate movement an essential element, is made apparent from the Court's refusal to consider, even under the doctrine of plain error, the claim that the charge omitted the alleged knowledge requirement. If the District Court had failed to charge on an essential element, this Court could have applied its discretionary power to notice plain error, a suggestion explicitly disavowed by the *Scandifia* opinion.

F.2d at 708. Although *Scandifia* might be read to suggest that in an extreme case, Section 2314 would not reach a situation where the defendant could not be found to have "reasonably foresee[n]" the interstate transportation of the merchandise, the decision cannot be understood to create knowledge of interstate transportation as an essential element under Section 2314. See, *United States v. DeKunchak*, *supra*, 467 F.2d at 436.* The great weight of judicial authority, as well as the manifest intent of Congress in enacting the National Stolen Property Act, see *United States v. Ludwig*, *supra*, 523 F.2d at 707, plainly supports Judge Hand's decision in *Tannuzzo*, which expressly rejects the notion that knowledge of interstate transportation is an essential element. Indeed, this Court repeatedly has refused to find knowledge of the jurisdictional fact as an essential element in prosecutions under other statutes as well which closely parallel the elements of Section 2314. See, e.g., *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Green*, 523 F.2d 229, 234 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976), and cases cited therein; *United States v. Jacobs*, 475 F.2d 270 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973). Cf. *United States v. Feola*, 420 U.S. 671 (1975).

Moreover, even under the test which defendants urge is created by *Scandifia*, the evidence at trial amply established that the interstate transportation of the securities was reasonably foreseeable. Michael, for example, took some of the checks to Canada and attempted to sell them

* *Scandifia* also has been distinguished or limited in its application by the decisions of other Circuits. In *United States v. Couden*, *supra*, 545 F.2d at 263, it was suggested that the foreseeability requirement of *Scandifia* might be applicable to a defendant charged as a principal under § 2314, but not to one charged as an aider and abettor. In *United States v. Ludwig*, *supra*, 523 F.2d at 708, the Eighth Circuit declined to read *Scandifia* and similar cases as imposing a requirement of reasonable foreseeability.

there. (Michael Tr. 22, 25). Furthermore, Michael admitted to agent Moody that he knew the package of checks he had given to Lipari in turn had gone to Steven Korsen, who had taken them to Washington where Korsen was arrested. (Michael Tr. 25). Mordecai also admitted knowing that the checks had been transported to Washington and seized. (Mordecai Tr. 40). Finally, the large quantity of readily negotiable instruments involved in this case gave rise to a compelling inference that the securities would be scattered about the country before being cashed. This inference further is advanced by the fact that the checks were drawn on a New York bank; thus, anyone who wished to negotiate the checks and minimize the risk of their detection as counterfeit would have been likely to cash them outside New York. Thus, any "foreseeability" requirement imposed by *Scandifia* was satisfied in this case.

The Silberbergs argue that their conviction on the conspiracy count also cannot stand because the Government furnished no proof that they conspired to transport the checks interstate. The argument both is factually and legally flawed.

First, as we have already demonstrated, the Government introduced substantial evidence that proved the Silberbergs knew that the checks were transported across state lines. Indeed, Michael's trip to Canada alone was sufficient to demonstrate his knowledge of interstate transportation under the conspiracy count.*

Second, the Silberbergs' argument is premised on *United States v. Jacobs, supra*, 475 F.2d at 281-282, which held that although knowledge of interstate trans-

* The conspiracy count of the indictment (1.7-9) charges the Silberbergs with transporting the securities in interstate and foreign commerce.

portation is not necessary for conviction under Section 2314, one must know of the interstate transportation in order to be guilty of conspiring to violate that statute. *Jacobs* relied for this proposition on *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941). There is little left of the so-called "*Crimmins* rule" after *United States v. Feola*, 420 U.S. 671 (1975). In *Feola* the Supreme Court held that the *scienter* requirement necessary for a conspiracy conviction could be no greater than that required for conviction on the underlying substantive offense. See, *United States v. Viruet, supra*; *United States v. Green, supra*. Since, as we have already shown, no knowledge of interstate transportation was necessary for conviction under Section 2314, none was required for conspiring to violate that statute. The Government's evidence thus was more than sufficient to convict the Silberbergs on both counts in the Indictment.

POINT IV

Defendants' Other Claims Are Without Merit.

In the last paragraph of their brief, defendants advance various arguments without either reasoned or factual elaboration. These contentions are meritless. Judge Metzner did not err in refusing to preclude the Government from cross-examining Michael about his activities after he fled from New York in October, 1975. (Michael Tr. 2-3). The Government was prepared to show that Michael was involved in various criminal activities, including interstate transportation of stolen motor vehicles and the submission of false applications to banks for loans and extension of credit, some of which are the subject of an indictment recently filed in the Western District of Pennsylvania. Those crimes involving fraud were certainly an appropriate subject for cross-examination had Michael taken the stand, see Fed. R. of Evid. 608(b), and indeed

might have been proved by the Government as similar acts on the claimed issues of knowledge and intent. Fed. R. Evid. 404(b); *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977); *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir. 1974), *cert. denied*, 421 U.S. 950 (1975), and cases cited therein. Michael's further argument that the court should have ruled "as a matter of law" that "his activities with respect to the counterfeit checks were protected by his role as an informant developing cases for the Government" is preposterous.

Mordecai claims that Judge Metzner should have dismissed the indictment against him because the testimony presented in the grand jury violated this Court's admonitions in *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). One of the Government's witnesses in the grand jury was agent Moody, who testified to the confessions made by Michael and Mordecai. Moody had been present during Michael's confession, but not during Mordecai's. Mordecai claims that the Government's presentation gave the grand jury the misleading impression that Moody had been present during Mordecai's confession as well. We submit that it did not. The transcript of Moody's testimony (GX 3504) shows that when questioned about Michael's confession, Moody was identified as a participant in the conversation.

"Q. On September 3, 1975, Mr. Moody, did Michael Silberberg confess to you that he had participated in a scheme to sell one point seven million dollars in counterfeit Bankers Trust Company cashier checks?

A. One point seven five million dollars, that is correct." (GX 3504, p. 3).

However, when Moody was first questioned about Mordecai's confession, he was not cast as a participant in the conversation:

"Q. On September 22, 1975, was Mordecai Silberberg interviewed by the FBI?

A. Yes, he was." (GX 3504, p.5).

Although the final question put to Moody concerning Mordecai was inadvertently cast by the prosecutor in the second person, Moody's testimony, taken as a whole, did not deceive or mislead the grand jury into thinking that his account of Mordecai's confession was based on first hand observation. In any event, Moody's testimony was far removed from that of the policemen in *Estepa*, whose testimony made it appear that he was in the midst of a complicated narcotics transaction. See *United States v. Harrington*, 490 F.2d 487, 490 (2d Cir. 1973).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JEREMY G. EPSTEIN,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

★ U. S Government Printing Office 1977—

714—059—702

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Jeremy G. Epstein, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

two That on the *5th* day of *December*, 1977
he served a copy of the within *encl*
by placing the same in a properly postpaid franked
envelope addressed:

Albert J. Brackley, Esq.
186 Jerusalem Street
Brooklyn, NY 11201

Howard L. Jacobs, Esq.
401 Broadway
New York, N.Y. 10013

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing in the United States Courthouse Annex,
One St. Andrew's Plaza, Borough of Manhattan, City
of New York.

Jeremy G. Epstein

Sworn to before me this

5th day of *December*, 1977

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978